



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

Uniform Fine Assessment Version 4.0 Software; Calculating Amounts of Civil Penalties for Violations of Regulations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA announces that the Agency has begun using the Uniform Fine Assessment (UFA) Version 4.0 software to calculate the amounts of civil penalties for violations of the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs). FMCSA is required to consider certain statutory factors when proposing civil penalties for violations of the FMCSRs and HMRs and since the mid-1990's FMCSA has used its UFA software to consider those statutory factors.

FMCSA has updated the UFA software to ensure that it adequately considers the statutory penalty factors for all statutes and regulations enforced by FMCSA; to implement the Agency's policy for consideration of the Small Business Regulatory Enforcement Fairness Act; and, to ensure uniformity in proposed civil penalties. UFA 4.0 software also considers the factors set forth in 49 U.S.C. § 521(b)(2)(D) for violations of regulations where no statutory factors are otherwise specified by statute. To enhance transparency of the civil penalty calculation, UFA 4.0 generates a report detailing the calculations used to propose civil penalties. While UFA 4.0 is used to calculate the majority of civil penalties proposed by FMCSA, the Agency may propose a civil penalty outside of UFA 4.0 when the proposed civil penalty calculated by UFA 4.0 would not

promote enhanced commercial motor vehicle safety or induce prompt and sustained compliance. In such cases, the Agency will nevertheless consider the applicable statutory factors to assess a penalty. This Federal Register Notice supersedes the Federal Register Notice issued by FMCSA entitled, “Civil Penalty Calculation Methodology. “ 76 FR 71431, November 17, 2011.

DATES: The UFA 4.0 software will be used to calculate penalties based on investigations that are initiated on or after August 12, 2013.

FOR FURTHER INFORMATION CONTACT: Peter Hines, Office of Chief Counsel, Federal Motor Carrier Safety Administration, 4749 Lincoln Mall Drive, Suite 300, Matteson, IL 60443, by telephone at (708) 283-3568 or via email at peter.hines@dot.gov. Office hours are from 9 a.m. to 5 p.m. CT, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 521(b)(2)(D) , 5123(c), 14901(c), 31138 and 31139, FMCSA must consider specific prescribed factors in determining the amount of civil penalties assessed for violations of the statutes and regulations for which FMCSA has enforcement authority. The purpose of the UFA 4.0 software is to assist FMCSA in ensuring uniformity and fairness in the application of mandatory statutory factors in calculating proposed civil penalties for violations of the FMCSRs, HMRs, commercial regulations, rules concerning minimum levels of financial responsibility, registration regulations, and other statutes and regulations enforced by FMCSA. The software is designed to ensure

that statutory, regulatory, and administrative policies are considered in determining each penalty assessment, to promote uniformity in assessments throughout FMCSA, and to create transparent and easily understood assessments. UFA 4.0 is not intended to assess the same civil penalty for the same violations against every motor carrier, but to assess a penalty that is consistent between carriers of similar circumstances.

FMCSA has used its UFA software to calculate penalties since the mid-1990's. Under a long line of administrative decisions, starting with *Alfred Chew & Martha Chew, dba Alfred & Martha Chew Trucking*, FHWA-1996-5323 (Final Order, Feb. 7 1996), FMCSA and its predecessor agency have held that UFA is presumed to properly consider the statutory penalty factors under 49 U.S.C. 521(b)(2)(D), 49 U.S.C. 5123(c), and 49 U.S.C. 31138 and 31139.

UFA 4.0 simplifies the algorithm previously used to calculate proposed penalties. The software also incorporates the increased penalties mandated by The Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141 (July 6, 2012). UFA 4.0 takes into account the factors set forth in 49 U.S.C. 521(b)(2)(D) for violations of the FMCSRs, 49 U.S.C. 5123(c) for violations of the HMRs, 49 U.S.C. 14901(c) for violations concerning transportation of household goods, and 49 U.S.C. 31138 and 31139 for violations of regulations related to financial responsibility.

Congress has not delineated statutory penalty factors (other than minimum and/or maximum penalties) for violations of operating authority registration requirements, other commercial regulations (49 CFR Parts 360-379) and Commercial Driver's License regulations (Parts 382 and 383). FMCSA has determined that the use of the statutory

factors in 49 U.S.C. 521(b) (the factors used to assess penalties for violations of FMCSRs) are appropriate for these violations as well as for any other statutory or regulatory violations where Congress has not identified any specific factors the Agency is required to consider in assessing civil penalties. Use of the statutory factors promotes uniformity and consistency in the Agency's determination of the appropriate amount of civil penalties.

STATUTORY, REGULATORY AND ADMINISTRATIVE REQUIREMENTS OF PENALTIES:

FMCSA must consider specific factors before proposing civil penalties for the majority of regulations it enforces. These factors are specified by statute.

Regulations	Applicability	Statute Setting forth Penalty Factors to be Considered
FMCSRs	49 CFR 350-399	49 U.S.C. Section 521(b)(2)(D)
HMRs	49 CFR 171-180; 49 CFR Part 385 - Subpart E (HM Safety Permits), CDL HM Endorsement (49 C.F.R. 383.121); violations of certain HM related out-of-service orders	49 U.S.C. Section 5123(c)
Minimum financial responsibility violations (Insurance)	49 CFR Part 387	49 U.S.C. Sections 31138 and 31139 (same factors for both sections).
HHG (household goods) regulations	49 CFR Part 375	49 U.S.C. Section 14901(c)

Specific penalties, as well as minimum and maximum penalties, may be established by statute for violations of the regulations or statutes enforced by FMCSA.

Appendices A and B of 49 CFR Part 386, as amended, also set forth penalties for violations of the regulations enforced by FMCSA. To ensure that penalties promote prompt and sustained compliance, and promote the interests of safety, FMCSA has also established administrative minimum and maximum penalties by policy where no specific penalties, and no minimum or maximum penalties, are provided by statute. The FMCSA Penalty Assessment Table identifies the minimums and maximums used in the UFA 4.0 calculation. The Penalty Assessment Table is posted at www.fmcsa.dot.gov/penaltyassessments.

UFA 4.0 software will not propose a penalty below an applicable minimum statutory penalty or above the applicable maximum statutory penalty. UFA 4.0 software may, however, generate a proposed penalty below an administrative minimum or above an administrative maximum. For example, UFA 4.0 will disregard an administrative maximum for violations that are charged under Section 222 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, Title II (Dec. 9, 1999), codified in 49 U.S.C. 521. Section 222 requires FMCSA to assess maximum statutory penalties if a violator is found to have committed a pattern of violations of critical or acute regulations, or previously committed the same or a related violation of critical or acute regulations. FMCSA previously published notices regarding its policies on assessing maximum penalties under Section 222. Copies of these policy notices can also be found at www.fmcsa.dot.gov/penaltyassessments.

EXPLANATION OF THE STATUTORY FACTORS:

Many of the statutory penalty factors for the FMCSRs, HMRs, HHG rules, and minimum financial responsibility are identical. The explanation of the factors below applies to each type of violation, except where indicated. Some of the factors are considered for each violator and others are considered for each violation.

Violation Factors:

1. “Nature” of violation. UFA 4.0 considers the nature of a violation by assigning the violation to a category based on the type of violation and whether the violation is by an individual or entity, and by establishing a penalty range consistent with the nature of the violation. Violations of a similar nature are grouped together and have been assigned a minimum and maximum fine amount. A breakdown of the different categories will be shown on the Penalty Assessment Table at www.fmcsa.dot.gov/penaltyassessments.

2. “Circumstances” of violation. UFA 4.0 considers the circumstances by evaluating the conditions, factors, or events accompanying the violation that, when present, may serve to increase or decrease a fine determination. These variables are considered cumulatively. Mitigating factors are any acts by the violator or situations which are extenuating or explanatory of the violation. Aggravating factors are any acts by the violator or situations which exacerbate, frustrate, or worsen the violation. These circumstances must not have been taken into account in any of the other statutory penalty factors. UFA 4.0 will use one of the following three choices for circumstances of the violation to calculate a fine: none, aggravating, or mitigating. An explanation of the

specific point values and how they are applied to calculate a penalty is included in the “Explanation of Calculations” document published at www.fmcsa.dot.gov/penaltyassessments.

3. For HHG violations, “harm to shipper or shippers” (see 49 U.S.C. § 14901(c)) means the monetary impact of the violation to the shipper (owner) of the household goods.

4. For HHG violations, “whether the shipper has been adequately compensated before institution of the proceeding” (see 49 U.S.C. § 14901(c)) means compensation to the shipper (owner) of the household goods before the administrative civil penalty proceedings occurred.

5. “Extent” is considered by evaluating the magnitude, scope, and frequency of the violations found as the result of an investigation. It measures whether the violation is isolated or widespread. Extent in UFA 4.0 is based on the percentage of violations discovered divided by the number of records checked. For example, if FMCSA discovers twenty false records of duty status [a violation of 49 C.F.R. §395.8(e)], after checking 200 records of duty status, the extent of the violation would be 10 percent (20 divided by 200). The resulting percentage is either high (greater than or equal to 10 percent) or low (less than 10 percent).

UFA 4.0 automatically calculates extent based on the number discovered versus the number checked and assigns point levels based on low or high levels of extent. Violations by individuals (usually drivers) and violations stemming from single incidents are each considered to have a low extent if there is a 1 of 1 discovered violation rate.

Companies having a 1 of 1 discovered violation rate during an investigation will be considered to have a high extent (100 percent). Interested parties may review this information at: www.fmcsa.dot.gov/penaltyassessments.

6. “Gravity” is considered by evaluating the seriousness of the violation. Gravity points are assigned as low, medium, high, or contributed to a crash or HM incident. If the violation caused a crash or an HM incident, the highest points will be assigned. If the violation caused an HM incident which resulted in a fatality, serious injury, illness or destruction of property, a maximum fine of \$175,000 may be assessed, overriding all other aspects of the UFA model. Interested parties may review this information at www.fmcsa.dot.gov/penaltyassessments .

Violator Factors:

1. “Culpability” is considered by evaluating the violator’s conduct or actions and knowledge of the violations, conditions, or practices that led to the discovered violations. It is an assessment of the violator, not the individual violation, and takes into account the fault level of the violator. For UFA, it is broken into 3 categories:

- a. Should have known of any of the discovered violation(s);
- b. Knew of any of the violation(s); and
- c. Intentional for any discovered violation(s).

Intentional violations of the regulations are assigned the highest number or points. Points are automatically assigned by UFA based on the selection of knowledge level relative to

the conduct of the violator. When available, see

www.fmcsa.dot.gov/penaltyassessments.

2. “History” is considered by evaluating the violator’s enforcement history with any U.S. Department of Transportation modal administration. Enforcement history is a major factor since it provides an indication of both the carrier’s or individual’s awareness of its safety obligations and its willingness to comply with the regulations. The history criteria relates to the violator (not the individual violation) and is determined by looking at the violator's closed cases (cases where there has been a finding of liability for the violations or where the violator has admitted the violations) in the previous six years and selecting one of the following levels:

- a. No enforcement history;
- b. Penalized for violation(s) in any other part(s);
- c. Penalized for violation(s) in the same part(s); and,
- d. Penalized for two or more prior cases or a prior case for violation of an Order.

In enforcement cases including HHG violations, UFA 4.0 will consider enforcement history, pursuant to 49 U.S.C. § 14901(c), only if the past violations are similar in nature to the HHG violations in the current enforcement case. UFA automatically assigns points based on the history level indicated. See www.fmcsa.dot.gov/penaltyassessments.

3. “Effect on ability to continue to do business” and “ability to pay” are considered by capping the proposed penalty at 2 percent of the violator’s gross revenue. UFA refers to this limitation on a total penalty as the “Gross Revenue Cap.” FMCSA has determined that capping most penalties at 2 percent of the violator’s gross revenue will allow most carriers to remain in business while inducing compliance with the regulations. Assessments will be lowered by the UFA 4.0 software to an amount equal to or below the Gross Revenue Cap, if needed. UFA 4.0 will assess a penalty below an administrative minimum if necessary to keep the total penalty below the Gross Revenue Cap. In some cases, such as when a minimum statutory penalty exceeds the Gross Revenue Cap, or where FMCSA asserts a maximum civil penalty pursuant to Section 222 of MCSIA, the penalties will not be reduced to an amount equal or below the Gross Revenue Cap.

4. “Such other matters,” as justice, fairness, and public safety may require, are considered by taking into account those factors that are not otherwise specified in the statute, but that nevertheless, have some bearing on the proposal of a civil penalty in the interests of justice and public safety in order to achieve the purposes of compliance. For purposes of calculating the amount of civil penalties, FMCSA has determined that corrective actions taken by the violator and the timing of those corrective actions are matters that are included within this category and may result in a reduction in the penalty. See www.fmcsa.dot.gov/penaltyassessments.

VIOLATION CALCULATIONS:

All calculations are made internally within the UFA 4.0 software based on the entries made by the user and the points assigned. UFA will reduce penalties for small

businesses by 20 percent to comply with the Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121 (Mar. 29, 1996), codified in 5 U.S.C. § 801, et seq. (SBREFA) when such reductions are applicable. FMCSA uses the Table of Small Business Size Standards, published periodically by the Small Business Administration, to identify small businesses.

FMCSA believes that a 20 percent difference in penalties between large and small businesses of similar circumstances is a reasonable exercise of the Agency's discretion and balances the principles of SBREFA with the requirement of 49 U.S.C. 521 to calculate penalties that are designed to induce further compliance with federal laws and regulations. Section 223 of SBREFA permits agencies to refrain from reducing penalties for small businesses in certain circumstances, such as when a small business has been subject to multiple enforcement actions by the agency, when the small business has engaged in willful or criminal conduct, or when the violations pose serious health, safety or environmental threats.

FMCSA will not apply the 20 percent reduction under SBREFA to a small business whose conduct corresponds to one of the exclusions listed in Section 223 of SBREFA. In addition to potential reductions for small businesses, reductions can occur to ensure that the total penalty does not exceed the Gross Revenue Cap. The UFA 4.0 methodology establishes a range of penalties for each violation, and when UFA reduces a penalty, it does so proportionally, based upon the ranges for each violation, rather than by a percentage of the total civil penalty assessment. Reductions must also take into consideration statutory and administrative minimum requirements. A detailed

explanation of the algorithm used by UFA 4.0 to calculate penalties is included in the “Explanation of Calculations” document that will be published at www.fmcsa.dot.gov/penaltyassessments. The User Manual that includes instructions for the use of UFA 4.0, a public version of the UFA software and FMCSA policies for the assessment of penalties, are available on the penalty assessment website at www.fmcsa.dot.gov/penaltyassessments.

The public version of UFA 4.0 will be modified to prevent accidental submission of data to FMCSA production databases.

Issued on: August 27, 2013

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Administrator

[FR Doc. 2013-21278 Filed 08/29/2013 at 11:15
am; Publication Date: 09/03/2013]